

(21)

Office - Supreme Court, U. S.

FILED

MAR 11 1942

CHARLES ELWOOD GROPLE  
CLERK

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1941**

---

**No. 1033**

---

**DAKOTA TRACTOR AND EQUIPMENT COMPANY,  
A CORPORATION,**

*Petitioner,*

*vs.*

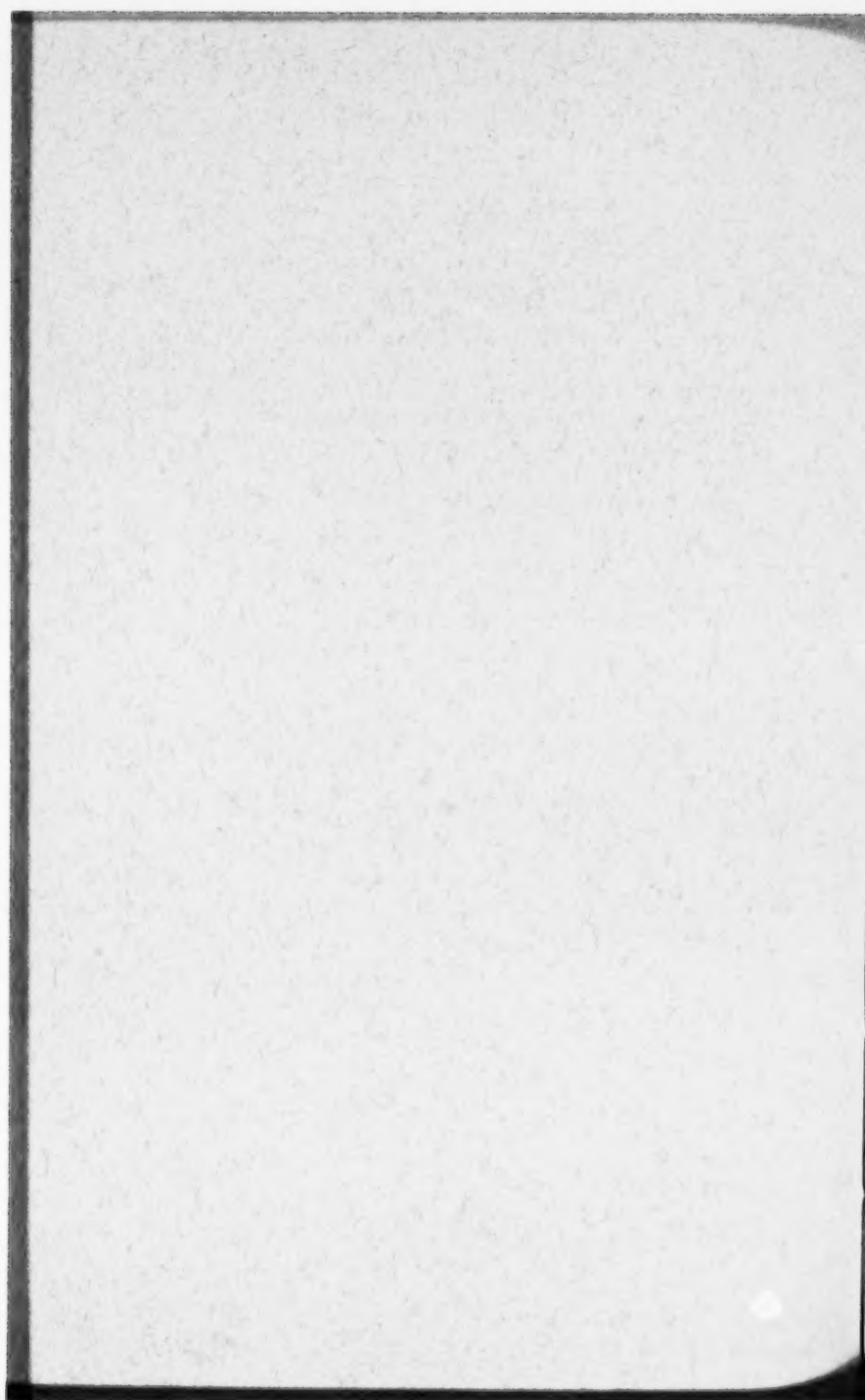
**THE UNITED STATES OF AMERICA.**

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.**

---

**W. H. SHURE,  
E. T. CONMY,**  
*Counsel for Petitioner.*



## INDEX.

### SUBJECT INDEX.

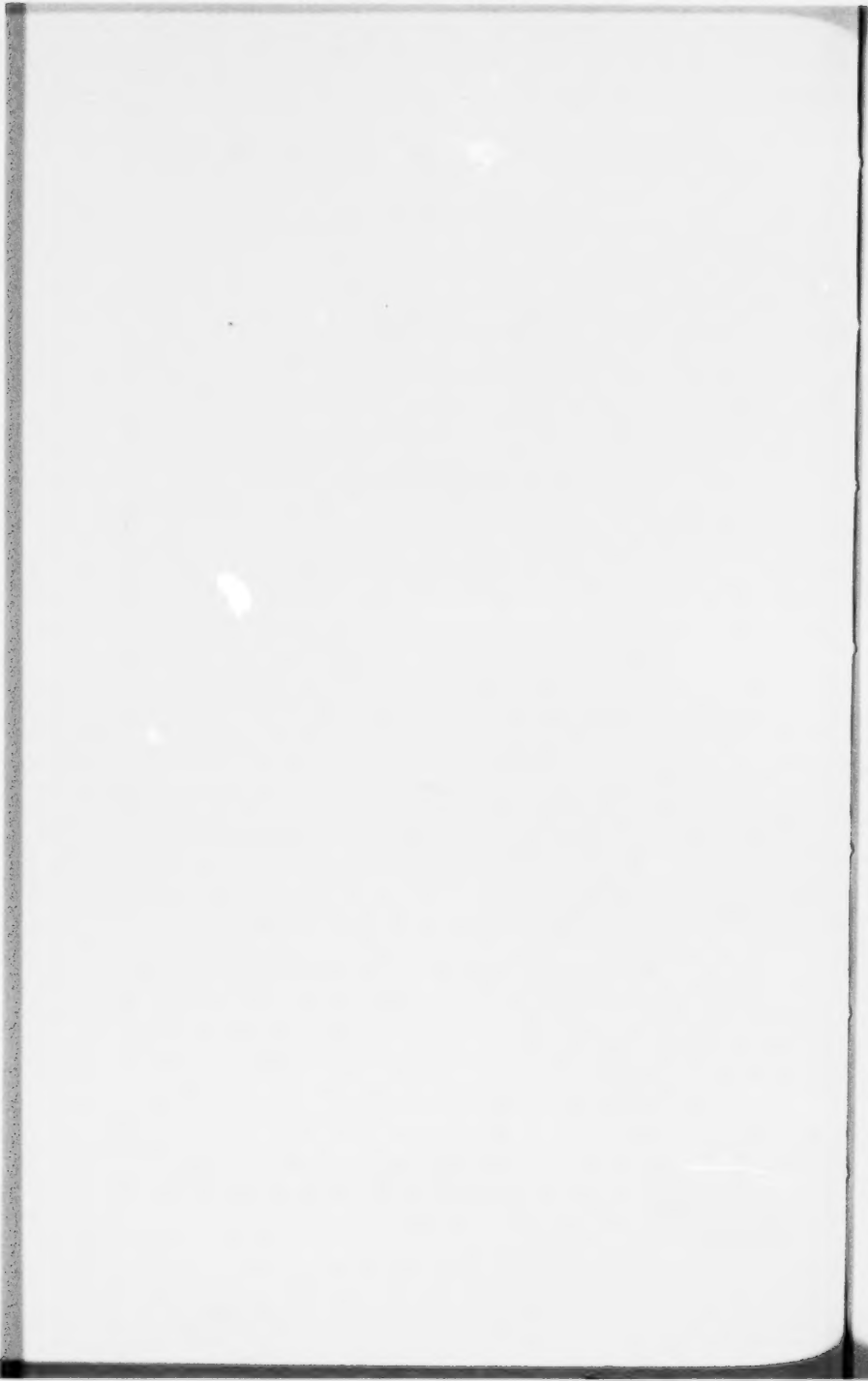
	Page
Petition for writ of certiorari .....	1
Summary statement of matter involved .....	1
Reasons relied upon for allowance of writ .....	3

### TABLE OF CASES CITED.

<i>Carbon Steel Co. v. Lewellyn</i> , 251 U. S. 501 .....	5
<i>Eisner v. Macomber</i> , 252 U. S. 11 .....	4
<i>Helvering v. Stockholms Bank</i> , 293 U. S. 84 .....	5
<i>Lynch v. Hornby</i> , 247 U. S. 339 .....	5
<i>Paraport Theatre Leasing Corp. v. Commissioner</i> , 44 B. T. A. 108 .....	3
<i>Williams v. Tel. Co.</i> , 93 N. Y. 189 .....	4
<i>Woolford Realty v. Rose</i> , 286 U. S. 319 .....	5

### STATUTES CITED.

Judicial Code, Section 240 .....	6
Revenue Act of 1936, Section 26(c) .....	2
Revenue Act of 1936, Section 26(c) (1) .....	2, 4, 5
Revenue Act of 1936, Section 115(a) .....	3, 4
Revenue Act of 1936, Section 115(f) .....	3



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

---

No. 1033

---

DAKOTA TRACTOR AND EQUIPMENT COMPANY,  
A CORPORATION,

*vs.*

*Petitioner,*

THE UNITED STATES OF AMERICA.

---

**PETITION FOR WRIT OF CERTIORARI.**

---

*To the Honorable the Chief Justice of the United States and  
Associate Justices of the Supreme Court of the United  
States:*

**Summary Statement of Matter Involved.**

In the petitioner and taxpayer's 1936 income tax return it claimed a credit in the computation of the surtax on undistributed profits under Section 26 (c) (1) of the Revenue Act of 1936 (R. 9, 27-37, 89). This credit was disallowed, a deficiency in amount \$5,832.19 was assessed accordingly and paid, claim for refund was filed for the amount paid and rejected and this suit was brought for the recovery of that amount (R. 9-10, 39-49, 50-53, 55-58, 59, 89-90).

The credit was claimed under Section 26 (c) of the 1936 Revenue Act (R. 9, 27, 89) which reads as follows:

SEC. 26. CREDITS OF CORPORATIONS.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

\* \* \* \* \*

(c) Contracts Restricting Payment of Dividends—

(1) Prohibition on Payment of Dividends—An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. If a corporation would be entitled to a credit under this paragraph because of a contract provision and also to one or more credits because of other contract provisions, only the largest of such credits shall be allowed, and for such purpose if two or more credits are equal in amount only one shall be taken into account.

\* \* \* \* \*

The contract under which the credit was claimed is printed in full at pages 82, 83, and 84 of the record and in brief it provides that "There shall be no cash withdrawals from the business in the form of cash dividends or otherwise until entire authorized capital stock of \$100,000.00 has been paid in". It also provides that "all profits shall remain in the business and from time to time the earned surplus shall be converted into paid-in capital through the declaration of stock dividends or otherwise."

The trial court held that the contract letter of May 13th, 1935, came within Section 26 (c) (1) and gave judgment to

petitioner (R. 90-91). This judgment was set aside by the Circuit Court, it holding that the word "dividends" meant dividends of all kinds and said "Since this contract letter prohibited payment only of dividends in the form of cash or property, it falls short of the requirements of 26 (c) (1) and can be no basis for the credit allowed thereby" (R. 111).

### **Reasons Relied On for Allowance of Writ.**

The allowance of a Writ of Certiorari is respectfully asked for the following reasons:

1st. The Circuit Court in reversing the trial court here has decided an important question of Federal law which has not been, but should be, settled by this court. The record here shows there are two litigants who are so vitally interested in this question that they tried to intervene here (R. 122). That Section 26 (c) (1) is the subject of a steadily increasing volume of litigation is clear (see C. C. H. 1942 Federal Tax Service, Volume 1, Paragraph 367.20 et al., and Index Volume, "Cumulative Numerical Index", Paragraph 367), and it is reasonable to suppose that the issue here involved is present in numerous cases not yet in the appellate courts.

2nd. The Circuit Court has rendered a decision in conflict with a decision of the Board of Tax Appeals. See *Paraport Theatre Leasing Corporation v. Commissioner*, 44 B. T. A. 108, where the word "dividends" was held to mean *taxable dividends*.

The vital and controlling point for decision is the meaning of the word "dividends" as used in Section 26 (c) (1). We submit that the Circuit Court has overlooked and not given consideration to Section 115 (A) or to Section 115 (F) (1) of the 1936 Act.

Section 115 (A) reads as follows:

“(a) Definition of Dividend. The term ‘dividend’ when used in this title (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.”

No money was distributed and as a stock dividend does not distribute property, no property was distributed.

See: *Eisner v. Macomber*, 252 U. S. 211;

*Williams v. Tel. Co.*, 93 N. Y. 189.

So we have the Act itself defining dividends and surely such a definition is controlling. Our contract prohibited dividends as defined by the Act so should entitle us to a credit.

Inasmuch as stock dividends sometimes do constitute a distribution of property we find the congress including in the Act in question Section 115 (F) (1) which reads as follows:

“General rule. A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution.”

This section makes more clear, we submit, that stock dividends which do not distribute property, such as were made here, are not “dividends” under Section 26 (c) (1).

In our view the word "dividends" in Section 26 (c) (1) should be construed as embracing only such distributions as diminish the corporation's assets. This is its commonly-accepted meaning and natural import in the business world (cf. *Lynch v. Hornby*, 247 U. S. 339, 346), and under familiar rules of construction (*Woolford Realty Co. v. Rose*, 286 U. S. 319, 327) is the meaning that should be attributed to it as used in the statute. Moreover, the intent of the statute was the prevention of the avoidance of surtax by accumulation of income, which a stock dividend does not do, and it is the intent, we are admonished (*Helvering v. Stockholms &c. Bank*, 293 U. S. 84, 93), that is controlling. Furthermore, contracts restricting payment of dividends customarily are for the benefit of creditors to prevent diminution of security, and it is only asset-distributions that make for such diminution. By the same token it is only asset-distributions that commonly are prohibited, with the result that if the Circuit Court's interpretation be adopted, the statute is robbed of a great deal of utility and is reduced to a practical nullity—something that should never be allowed. *Carbon Steel Co. v. Lewellyn*, 251 U. S. 501, 504, 505, 506.

Your petitioner believes that the judgment of the Circuit Court of Appeals is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript

of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled United States of America, Appellant, v. Dakota Tractor & Equipment Company, A Corporation, Appellee, No. 12,014 at Law, to the end that the said case may be reviewed and determined by this Court as provided in Judicial Code, Sec. 240, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

W. H. SHURE,  
E. T. CONMY,  
*Attorneys for Petitioner.*

